

House Bill 234

By: Representatives Hatfield of the 177<sup>th</sup>, Keen of the 179<sup>th</sup>, Channell of the 116<sup>th</sup>, Parrish of the 156<sup>th</sup>, Rice of the 51<sup>st</sup>, and others

A BILL TO BE ENTITLED  
AN ACT

1 To revise provisions of the Official Code of Georgia Annotated relating to the use of experts  
2 in judicial proceedings; to amend Title 24 of the Official Code of Georgia Annotated, relating  
3 to evidence, so as to change provisions relating to when the opinions of experts are  
4 admissible; to provide that an expert must meet certain qualifications in order to execute an  
5 affidavit for use in a professional malpractice action; to amend Title 9 of the Official Code  
6 of Georgia Annotated, relating to civil practice, so as to change provisions relating to  
7 affidavits in professional malpractice cases; to eliminate certain provisions excusing  
8 noncompliance with certain deadlines; to provide for other matters related to the foregoing;  
9 to provide for an effective date and applicability; to repeal conflicting laws; and for other  
10 purposes.

11 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

12 **SECTION 1.**

13 Title 24 of the Official Code of Georgia Annotated, relating to evidence, is amended by  
14 striking Code Section 24-9-67, relating to expert opinion evidence, and inserting in its place  
15 a new Code section to read as follows:

16 "24-9-67.

17 ~~The opinions of experts on any question of science, skill, trade, or like questions shall~~  
18 ~~always be admissible; and such opinions may be given on the facts as proved by other~~  
19 ~~witnesses.~~

20 (a) If scientific, technical, or other specialized knowledge will assist the trier of fact in any  
21 cause of action to understand the evidence or to determine a fact in issue, a witness  
22 qualified as an expert by knowledge, skill, experience, training, or education may testify  
23 thereto in the form of an opinion or otherwise, if: (1) the testimony is based upon sufficient  
24 facts or data; (2) the testimony is the product of reliable principles and methods; and (3)  
25 the witness has applied the principles and methods reliably to the facts of the case.

(b) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(c) Upon motion of a party, the court shall hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of this Code section. Such hearing and ruling shall be completed no later than the pretrial conference contemplated under Code Section 9-11-16, or 45 days prior to the date set for trial.

(d) In interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), General Electric Co. v. Joiner, 522 U.S. 136 (1997), and Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999), and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

(e) An affiant must meet the requirements of this Code section in order to be competent to testify as an expert for purposes of the affidavit required under Code Section 9-11-9.1."

## SECTION 2.

Title 9 of the Official Code of Georgia Annotated, relating to civil practice, is amended by striking Code Section 9-11-9.1, relating to affidavits in professional malpractice cases, and inserting in its place a new Code section to read as follows:

"9-11-9.1.

(a) In any action for damages alleging professional malpractice against a professional licensed by the State of Georgia and listed in subsection ~~(f)~~(d) of this Code section or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection ~~(f)~~(d) of this Code section, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify pursuant to Code Section 24-9-67, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

~~(b) The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith~~

1 ~~basis to believe it will expire on any claim stated in the complaint within ten days of the~~  
2 ~~date of filing and, because of such time constraints, the plaintiff has alleged that an~~  
3 ~~affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days~~  
4 ~~after the filing of the complaint to supplement the pleadings with the affidavit. The trial~~  
5 ~~court may, on motion, after hearing and for good cause extend such time as it shall~~  
6 ~~determine justice requires. If an affidavit is not filed within the period specified in this~~  
7 ~~subsection or as extended by the trial court and the defendant against whom an affidavit~~  
8 ~~should have been filed alleges, by motion to dismiss filed contemporaneously with its~~  
9 ~~initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the~~  
10 ~~complaint is subject to dismissal for failure to state a claim.~~

11 ~~(c) This Code section shall not be construed to extend any applicable period of limitation,~~  
12 ~~except that if the affidavit is filed within the period specified in this Code section, the filing~~  
13 ~~of the affidavit after the expiration of the statute of limitations shall be considered timely~~  
14 ~~and shall provide no basis for a statute of limitations defense.~~

15 ~~(d)(b)~~ If a plaintiff files an affidavit which is allegedly alleged to be defective, and by the  
16 defendant to whom it pertains ~~alleges~~, with specificity, by in a motion to dismiss filed  
17 contemporaneously with its initial responsive pleading, ~~that said affidavit is defective~~, the  
18 plaintiff's complaint is subject to dismissal for failure to state a claim, ~~except that the~~. The  
19 plaintiff may cure the alleged defect by amendment made pursuant to Code Section 9-11-15  
20 within 30 days of service of the motion alleging that the affidavit is defective. ~~The trial~~  
21 ~~court may, in the exercise of its discretion, extend the time for filing said amendment or~~  
22 ~~response to the motion, or both, as it shall determine justice requires.~~

23 ~~(e)(c)~~ If a plaintiff fails to file an affidavit as required by this Code section and the  
24 defendant raises the failure to file such an affidavit by motion to dismiss filed  
25 contemporaneously with its initial responsive pleading, such complaint shall not be subject  
26 to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable  
27 period of limitation, ~~unless a court determines that the plaintiff had the requisite affidavit~~  
28 ~~within the time required by this Code section and the failure to file the affidavit was the~~  
29 ~~result of a mistake.~~

30 ~~(f)(d)~~ The professions to which this Code section applies are:

- 31 (1) Architects;
- 32 (2) Attorneys at law;
- 33 (3) Certified public accountants;
- 34 (4) Chiropractors;
- 35 (5) Clinical social workers;
- 36 (6) Dentists;
- 37 (7) Dietitians;

- (8) Land surveyors;
- (9) Medical doctors;
- (10) Marriage and family therapists;
- (11) Nurses;
- (12) Occupational therapists;
- (13) Optometrists;
- (14) Osteopathic physicians;
- (15) Pharmacists;
- (16) Physical therapists;
- (17) Physicians' assistants;
- (18) Professional counselors;
- (19) Professional engineers;
- (20) Podiatrists;
- (21) Psychologists;
- (22) Radiological technicians;
- (23) Respiratory therapists; or
- (24) Veterinarians."

### **SECTION 3.**

This Act shall become effective July 1, 2005. Section 1 of this Act shall apply with respect to actions pending on that date as well as actions filed on or after that date. Section 2 of this Act shall apply with respect to actions filed on or after that date.

### **SECTION 4.**

All laws and parts of laws in conflict with this Act are repealed.